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PETITION FOR CERTIORARI

NO. 629

IN THE

Supreme Court of The United States

October Term, 1967

OTTO C. BOLES, Warden of the
West Virginia State Penitentiary,
Petitioner

vs.

STANLEY SHEFTIC, and
JOHN HOWARD RUNYON, JR.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Petitioner, Otto C. Boles, Warden of the West Virginia Penitentiary, prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled case on May 4, 1967. A timely petition for rehearing was denied on June 19, 1967.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on May 4, 1967. A timely petition for rehearing was denied on June 19, 1967. The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

QUESTION PRESENTED

Where a State provides a post conviction review procedure by which a State prisoner is afforded a full and fair evidentiary hearing and appeal therefrom, should the federal courts permit a State prisoner to deliberately by-pass this procedure and allow him to use the federal court as the initial fact-finding forum.

CITATION OF OPINIONS BELOW

Stanley Sheftic:

An application to the United States District Court for the Northern District of West Virginia for a Writ of Habeas Corpus was summarily dismissed, with no memorandum having been filed, but as set forth in the Order dated January 12, 1966, "* * * for reasons set forth in a written Memorandum filed in the case of Jack M. Miller vs. Otto C. Boles, Warden, Civil Action File No. 468-E, dated November 23, 1965 * * *", reported in 248 F. Supp. 49 (see Appendix hereto P. A-1). The opinion of the United States Court of Appeals for the Fourth Circuit, reversing the judgment of the District Court, is reported in 377 F. 2d 423. A petition to the United States Court of Appeals for the Fourth Circuit for a rehearing en banc was summarily denied on June 19, 1967 (see Appendix hereto P. A-25, A-33).

John Howard Runyon, Jr.:

An application to the United States District Court for the Northern District of West Virginia for a Writ of Habeas Corpus was summarily dismissed, with no memorandum having at the time been filed, but as set forth in the Order dated January 12, 1966, "* * *

for reasons set forth in a written Memorandum filed in the case of Jack M. Miller vs. Otto C. Boles, Warden, Civil Action File No. 468-E, dated November 23, 1965 * * *", reported in 248 F. Supp. 49 (see Appendix hereto P. A-1). The District Court then filed a written Memorandum dated February 16, 1966 (see Appendix hereto P. A-24). The opinion of the United States Court of Appeals for the Fourth Circuit, reversing the judgment of the District Court, dated May 4, 1967, is reported in 377 F. 2d 423. A petition to the United States Court of Appeals for the Fourth Circuit for a rehearing en banc was summarily denied on June 19, 1967 (see Appendix hereto P. A-33).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States:

Amendments 6 and 14.

Constitution of West Virginia:

Article I, Section 2.

Article III, Sections 10 and 14.

Article VIII, Sections 3 and 12.

28 U.S.C.A. § 2254, as amended.

West Virginia Code, Chapter 51, Article 1, Section 3, as amended

West Virginia Code, Chapter 51, Article 2, Section 2, as amended

West Virginia Code, Chapter 53, Article 4, Section 1, as amended

West Virginia Code, Chapter 53, Article 4A, Sections 1 and 3, as amended

The Official Code of West Virginia of 1931, Chapter 62, Article 8, Section 4.

STATEMENT

For clarity, the parties will be hereafter referred to by name or as petitioner and respondent as they appear in this application.

Respondent, Stanley Sheftic, pleaded guilty to two charges of breaking and entering and was sentenced to confinement in the State Penitentiary at Moundsville, Marshall County, West Virginia. Subsequent thereto, the Warden of the prison instituted proceedings under the West Virginia Habitual Criminal Statute [West Virginia Code, Chapter 62, Article 8, Section 4 (1931)], charging four previous felony convictions. The sole issue involved was Sheftic's identity. As was his right, a jury was impaneled to determine the issue. Sheftic was found to be the same person identified in the information filed by the Warden of having been convicted of at least two prior felony offenses and was sentenced to life imprisonment.

Respondent Sheftic has filed various petitions for writs of habeas corpus in the Supreme Court of Appeals of West Virginia. In the last petition filed in the West Virginia Court, Sheftic alleged that his guilty plea to the principal offense for which he was then serving a sentence had been coerced. The petition was denied without a hearing on November 23, 1964. The allegation of this factual issue had never been presented to the Circuit Court of Marshall County, West Virginia, or any other Circuit Court in the State of West Virginia, where a full and fair evidentiary hearing could have been held to resolve it.

The respondent, after having been denied the relief sought by the Supreme Court of Appeals of West Vir-

ginia, petitioned the United States District Court for the Northern District of West Virginia pursuant to 28 U.S.C. § 2241. The District Court dismissed Sheftic's petition pursuant to 28 U.S.C. § 2254; holding that he had not exhausted the remedies available in the Courts of the State of West Virginia.

Respondent, John Howard Runyon, Jr., represented by Court-appointed counsel, changed his plea from not guilty to guilty to the felony offense of breaking and entering and was sentenced to the West Virginia State Penitentiary at Moundsville, Marshall County, West Virginia, for a term of one to ten years. Runyon filed a petition for a writ of habeas corpus in the Supreme Court of Appeals of West Virginia, alleging that he had been denied the right to the effective assistance of counsel. The petition was denied without a hearing on October 18, 1965. Respondent had never attempted to resolve the factual issue presented to the Supreme Court of Appeals of West Virginia by presenting it to the Circuit Court of Marshall County, West Virginia, or any other Circuit Court in the State of West Virginia.

Subsequently, Runyon petitioned the United States District Court for the Northern District of West Virginia for a writ of habeas corpus, raising the same factual issue as he had before. The District Court dismissed Runyon's petition pursuant to 28 U.S.C. § 2254, holding that he had not exhausted the remedies available in the Courts of the State of West Virginia.

Both Stanley Sheftic and John Howard Runyon, Jr., appealed the rulings of the District Court to the United States Court of Appeals for the Fourth Circuit. The

Court of Appeals reversed the judgment of the District Court by order dated May 4, 1967. *Sheftic* v. *Boles* and *Runyon* v. *Boles*, 377 F. 2d 423 (1967).

The petitioner petitioned the Court of Appeals for a rehearing en banc, which rehearing was summarily denied on June 19, 1967. The Court of Appeals subsequently, upon timely application, stayed the issuance of certified copies of the judgments in lieu of mandates pending a timely application by the petitioner to the Supreme Court of the United States for a writ of certiorari.

The District Court denied the petitions of the respondents for two paramount reasons. One being that, in each of the cases, the issues raised were factual in nature, the resolution of which necessitated a plenary hearing. Neither of the petitioners had ever sought a forum where the facts could have been developed but, to the contrary, sought relief in the Supreme Court of Appeals of West Virginia, where the procedures do not provide for evidentiary hearings. The second reason was that the District Court believed that the State should have the first opportunity to resolve such issues.

REASONS FOR GRANTING THE WRIT

(1) The decision of the Court of Appeals, as is now becoming more evident, prevents the State of West Virginia from having the first opportunity to determine the claims and to correct any federal constitutional deprivations which may exist. The decision frustrates the attempts of the State of West Virginia to assure those persons who are accused of criminal

offenses that their constitutionally given rights, both federal and state, will be observed and that no person will be denied due process or the equal protection of the law.

The decision has the effect of and has contributed to a growing frequency of petitions being filed directly in the Supreme Court of Appeals of West Virginia, where, due to the relatively limited evidentiary procedures and the unavailability of formal hearings, the Supreme Court is compelled to resolve factual issues on the basis of the pleadings, affidavits, exhibits, etc., and the writ is often times refused as a result of the petitioner's failure to adequately develop the facts. The decision has made it possible for those persons seeking post-conviction review to avoid the adequate procedures provided by the State of West Virginia and thus circumvent both the obvious intent of the State to safeguard the constitutional rights of individuals and the desire of the federal courts to leave to the states the opportunity to do so.

(2) The Memorandum by the Honorable Robert E. Maxwell, Judge of the United States District Court for the Northern District of West Virginia, filed in the case of *Miller* v. *Boles*, 248 F. Supp. 49, is a comprehensive and exhaustive study of the law as applied to exhaustion of available state remedies required by 28 U.S.C. § 2254. The conclusions of the District Judge are sound and well reasoned. The rule announced thereby should be affirmed and adopted by this Court as the pronouncement of what constitutes the exhaustion of available state remedies insofar as 28 U.S.C. § 2254 requires. We urge that this Court give most careful consideration to the reasoning and conclusions

of Judge Maxwell and adopt the view expressed in his Memorandum as the rule of this Court.

(3) This Court has long taken the position that it is advisable to permit the State courts to manage their own affairs as to court procedures, especially with reference to criminal law. This apparently stems from the desire to limit federalism in State courts, an evil the Federal courst apparently are desirous of avoiding. However, since the 1963 cases of *Fay* v. *Noia*, 372 U.S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837, and *Townsend* v. *Sain*, 372 U.S.293, 83 S. Ct. 745, 9 L. Ed. 2d 770, habeas corpus petitions have more frequently been filed in both State and Federal courts primarily because of the more careful approach in determining whether there has been a knowing and intelligent waiver of a Federal constitutional right. In this keeping, and this court's efforts to establish realistic guidelines for State courts to follow in order to reduce the instances requiring Federal court intervention, Mr. Justice Brennan, in his concurring opinion in *Case* v. *Nebraska*, 381 U.S. 336, 85 S. Ct. 1486, 14 L. Ed. 2d 422 (1965), in setting forth the guidelines for developing a desirable procedure for post-conviction review, said at page 347 of 381 U.S., *supra* the procedure: "xxx should be swift and *simple and easily invoked. It should be sufficiently comprehensive to embrace all federal constitutional claims. In light of *Fay* v. *Noia*, supra, it should eschew rigid and technical doctrines of forfeiture, waiver, or default. See *Douglas* v. *Alabama*, 380 U.S. 415, 422-423, 13 L. ed 2d 934, 938, 939, 85 S. Ct. 1074; *Henry* v. *Mississippi*, supra. It should provide for full fact hearings to resolve disputed factual issues, and for compilation of a record to enable federal courts to determine the sufficiency of those

hearings. *Townsend* v. *Sain*, supra. It should provide for decisions supported by opinions, or fact findings and conclusions of law, which disclose the grounds of decision and the resolution of disputed facts." Provision for counsel to represent prisoners, as in § 4 of the Nebraska Act. would enhance the probability of effective presentation and a proper disposition of prisoners' claims. The West Virginia Post-Conviction Review statute adequately provides for these procedures.

(4) The decision of the Court of Appeals appears to be based upon the following four grounds:

(a) That it would be futile to expect a circuit court to grant a hearing after the Supreme Court of Appeals had denied the prisoner relief on the identical claim he would urge before the circuit court.

(b) That the scope of habeas corpus in West Virginia is not akin to federal habeas corpus.

(c). That the West Virginia circuit courts do not grant full and fair evidentiary hearings.

(d) That it would be unfair to the respondents to require that they now avail themselves to state remedies before petitioning the federal court.

Ground (a), as does ground (c), presupposes that there had been a constitutional deprivation. However, the small percentage of cases arising out of West Virginia for which relief is granted by the federal courts is evidence to the contrary. It is becoming more evident, particularly since the passage of Chapter 53, Article 4A, of the West Virginia Code, the West Virginia Post-Conviction Review Statute, enacted and

effective since January 25, 1967, that the circuit courts of this State are not reluctant to grant a hearing on a petition for a writ of habeas corpus where a petition alleging the same grounds and raising the same issues has been previously filed in the Supreme Court of Appeals of West Virginia, and there denied. It is also becoming increasingly evident that a large percentage of those petitioners who are granted relief by the federal courts are those who did not first attempt to obtain a hearing under the state post-conviction review statute. The overall effect is to defeat the intent and frustrate the efforts of the State of West Virginia to protect the individual's constitutional rights.

Ground (b) is completely erroneous. The Constitution of West Virginia is patterned after the Constitution of the United States, and it guarantees the same rights and safeguards to individuals as does the latter. If there has ever been any serious question along this line, it has certainly been resolved by the enactment of Chapter 53, Article 4A, of the West Virginia Code, *supra*.

Ground (c) is as erroneous as ground (b). However, it should be pointed out that the enactment of West Virginia Code, Chapter 53, Article 4A, *supra*, which became effective just thirteen days after the District Court denied relief to the respondents, extended original jurisdiction of habeas corpus matters to all circuit courts and to certain courts of limited jurisdiction. It requires that a record of all proceedings be made. It has long been the policy of the State of West Virginia to appoint counsel for indigent petitioners. To say that West Virginia circuit courts do not grant full and fair evidentiary hearings is to reflect

adversely upon the honorable judges of the circuit courts and the members of the State Bar Association who have willingly and freely given of their time and energies to assure that constitutional rights have not been and will not be denied, and further infers that an attitude of indifference exists among those who are dedicated to the preservation of constitutional rights.

Whether or not requiring the respondents to present their claims to a circuit court before re-submitting the same to the district court would deny them a real benefit overlooks the fact that the respondents could have availed themselves of the State remedies well over a year ago. Had relief then been denied by the State courts, the respondents could have petitioned the United States District Court and by this time have had its decision.

The theory of "unfairness" also presupposes that the claims of the respondents will be resolved in their favor. If so, the State of West Virginia is entitled to the first opportunity through its very adequate procedures to correct whatever miscarriage there may have been.

(5) This court should take notice of the tremendous adverse impact of a pronouncement that petitioners for writs of habeas corpus need not seek a full and fair evidentiary hearing in West Virginia prior to seeking post-conviction review in a federal court. This court should also take note of the increased burden which will fall upon both the Supreme Court of Appeals of West Virginia and the United States District Courts having jurisdiction in the State of West

Virginia if the judgment of the Court of Appeals is permitted to stand.

(6) In addition to the foregoing, it is submitted that the issues presented herein should and must be determined and settled by the highest court of the land in order to give a solution to a problem which perplexes many district courts and thus give stability and consistency throughout the states and provide guidelines which can be followed by all of the jurisdictions.

It is contended that, even though the Constitution of West Virginia and the West Virginia statutes do create alternative methods by which post-conviction review might be had, it is necessary and of paramount importance that when the claim upon which the prayer for relief is grounded gives rise to a factual dispute, the State be entitled to the right and reasonable opportunity to determine the issues. Until the State has had such an opportunity, a petitioner should not be permitted to plead that he has exhausted the available State remedies. Federal permission to circumvent, avoid and frustrate the procedures and efforts of the states should not be given.

We, therefore, petition for redress in the most humble terms and solemnly call upon this court by our common desires, beliefs and dedications to disavow this usurpation of state judicial process.

CONCLUSION

For the foregoing reasons, we conclude as follows:

1. That this court should grant certiorari and reverse the judgment entered by the Court of Appeals

for the Fourth Circuit on May 4, 1967, and then decide the question as to whether or not the respondents had exhausted the State remedies available to them as required by 28 U. S. C. A. 2254, or,

2. That this court should grant certiorari and reverse the judgment entered by the Court of Appeals herein on June 21, 1967, and remand this case to the Court of Appeals with the direction to grant a rehearing en banc on the sole issue here presented.

Respectfully submitted,

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